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No. 90-1019

In the Supreme Court of the United States

OCTOBER TERM, 1990

IMCO, INC., ET AL., PETITIONERS

v.

CURTIS R. MORTON, ETC., ET. AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether 15 U.S.C. 637(b)(7)(A) requires the Department of Defense to refer to the Small Business Administration the suspension and proposed debarment of a small business before prohibiting that small business from receiving government procurement contracts.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. A1-A3) is unreported, but the judgment is noted at 919 F.2d 744 (Table). The decision of the district court (Pet. App. A4-A15) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1990. The petition for a writ of certiorari was filed on December 13, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Department of Defense, like most government agencies, typically procures property and services through a competitive bidding process in which "all responsible sources" may submit sealed bids. See 10 U.S.C. 2304(a)(1)(A); 10 U.S.C. 2302(2)(C)(i); 10 U.S.C. 2302(3); 41 U.S.C. 403(6). However, under the Federal Acquisition Regulation (FAR), 48 C.F.R. Ch. 1, which governs the bidding process, a prospective contractor that has demonstrated a "history of failure to perform, or of unsatisfactory performance of, one or more contracts," is subject to debarment—*i.e.*, exclusion from consideration for further contracts. See 48 C.F.R. 9.406-2(b)(1); 48 C.F.R. 9.403; 48 C.F.R. 9.405(a).

Congress has declared that small businesses should be able to participate in the competitive bidding process. 15 U.S.C. 631(a). To that end, the Small Business Act authorizes the Small Business Administration (SBA) to "certify to Government procurement officers * * * with respect to * * * [the] responsibility * * * of any small business concern * * * to receive and perform a specific Government contract." 15 U.S.C. 637(b)(7)(A). A procurement officer may not preclude a small business from receiving a particular contract for reasons related to responsibility "without referring the matter [to the SBA] for a final disposition." *Ibid.*

The FAR echoes the Small Business Act, and provides that contracting officers must refer determinations of a small business' responsibility to the SBA before they may award a specific contract to another concern. 48 C.F.R. 19.602-1(a). In other words, a particular contract may not be withheld from a small business (and awarded to any other company) on the ground that the small business is not competent to perform that contract, until the SBA has the opportunity to rule on the small business' responsibility. See 48 C.F.R.

Subpt. 19.6. The FAR provides, however, that referral to the SBA for a determination of responsibility is not necessary "if the small business concern * * * [i]s suspended or debarred under * * * [48 C.F.R.] Subpart 9.4." 48 C.F.R. 19.602-1(a)(2)(ii).

2. Petitioners are small businesses engaged in the manufacture of military hardware and component parts for sophisticated weapons systems. Pet. App. A27.[1] In September 1986, petitioners began receiving contracts from the United States Army Missile Command, winning approximately 65 contracts by November 1988.[2] Gov't C.A. Br. 4. During this period, more than half of petitioners' contracts were terminated because of performance failure.[3] *Ibid.*

As a result of this "chronic failure * * * to perform in accordance with contractual requirements," Pet. App. A6, the Army notified petitioners in October 1989 of their suspension and proposed debarment, *ibid.* Accordingly, the Army refused to consider bids submitted by petitioners on 18 new contracts. Pet. App. A34-A35.

3. Rather than await the outcome of an administrative challenge to their proposed debarment, petitioners brought this action in United States District Court for the Northern District of Alabama, seeking a preliminary injunction prohibiting the Army from refusing to consider petitioners' bids

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[1] Petitioner Ikard is the owner of petitioners IMC and IMCO. Pet. App. A5. For ease of reference, we will refer to all three as "petitioners," although only one of the entities may actually be involved in a given situation.

[2] The 1986 contracts were won following a 1-year debarment in January 1985 for failure properly to perform a number of contracts. Gov't C.A. Br. 4.

[3] Seventeen contracts or purchase orders were terminated because petitioners defaulted on them, and 21 others were terminated for convenience at the request of petitioners. Gov't C.A. Br. 4.

without SBA referral.[4] Pet. App. A16-A17. Petitioners complained that the suspension and proposed debarment violated 15 U.S.C. 637(b)(7)(A), as the Army had not referred the matter to the SBA for that agency's determination of petitioners' responsibility. Pet. App. A6-A7.

The district court denied petitioners' motion for a preliminary injunction and dismissed the case due to petitioners' failure to exhaust their administrative remedies. Pet. App. A13. The court held that Section 637(b)(7)(A) "is by its terms limited to Government action on [a] specific contract and is [therefore] inapplicable to suspensions and proposed debarments," which do not relate to a "specific" contract. Pet. App. A8. The district court explained that "[t]he Small Business Act was designed * * * to preclude procurement officers from assuming that small businesses, simply because of their size, would be unable to perform specific contracts. The [SBA] was intended to provide expertise on the capabilities of small businesses." Here, the court determined, that expertise did not matter, since petitioners' "suspension and proposed debarment [were] not based on predictions [about their] present or future performance," but on evaluation of their actual past performance.[5] Pet. App. A9-A10. SBA referral was therefore not required.

4. The court of appeals summarily affirmed.

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[4] We are informed that the administrative proceedings ultimately resulted in a 2-year debarment, of which petitioners have not sought judicial review.

[5] The court held alternatively that even if Section 637(b)(7)(A) generally applied to suspensions and debarments, it would not apply in this case, because the Act was intended to protect small businesses from discrimination based on size, and the Army's actions were based on petitioners' failure to meet contractual obligations and had nothing to do with petitioners' size. Pet. App. A11-A12.

ARGUMENT

Under the relevant statutes and regulations, the Army was not required to refer petitioners' suspension and proposed debarment to the SBA. Because the holdings of the courts below do not conflict with any decision of another court of appeals or of this Court, further review is unwarranted.

1. The district court correctly held that 15 U.S.C. 637(b)(7)(A) does not apply to suspensions and debarments. By its terms, that provision requires SBA certification only with respect to the responsibility of a small business "to * * * perform a specific * * * contract." The language of the statute is clear and unambiguous, and makes no mention of suspensions or debarments: Congress requires SBA referral only as to specific contracts, and no specific contract is at issue here. That interpretation is confirmed by the FAR, which expressly provides that SBA referral is "not necessary if the small business concern * * * [i]s suspended or debarred," 48 C.F.R. 19.602-1(a)(2)(ii), as petitioners were. Both the statutory language and administrative interpretation require the result reached by the district court and the court of appeals.[6]

Furthermore, the courts of appeals have consistently held that "[t]he purpose of [section 637(b)(7)(A)] * * * was to end the discrimination against small business that existed * * * solely because of their smallness," and therefore, adverse action taken against a small business for reasons not related to its size does not trigger SBA referral. *Siller Bros.* v. *United States*, 655 F.2d 1039, 1044 (Ct. Cl. 1981),

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[6] There is therefore no force to petitioners' argument (Pet. 22-32) that SBA referral was required because suspension and debarment implicate the "responsibility" of a small business, and "responsibility" is the subject of SBA certification under the terms of the statute. Such referral is required only as to a "specific contract."

cert. denied, 456 U.S. 925 (1982); *NFK Eng'g, Inc.* v. *United States*, 805 F.2d 372, 378 (Fed. Cir. 1986); *Electro-Methods, Inc.* v. *United States*, 728 F.2d 1471, 1476 (Fed. Cir. 1984); see also *Shermco Indus., Inc.* v. *Secretary of the Air Force*, 584 F. Supp. 76, 81-87 (N.D. Tex. 1984).[7] Here, as the district court held, petitioners' suspension and debarment "grew out of failure to perform in accordance with contractual requirements," and was unrelated to petitioners' size. Pet. App. A12. Therefore, as the district court held, even if debarment could require SBA referral, it would not have done so in this case.

2. Petitioners incorrectly assert (Pet. 20-21) that SBA referral was required because petitioners made bids on 18 specific contracts. The Army's refusal to consider these bids, however, was based on petitioners' suspension and debarment—which prohibited them from participating in any procurement activity—and not on any factor relevant to the specific contracts at issue. There was therefore no need for SBA's opinion of petitioners' responsibility to perform any of those contracts. Moreover, a prospective contractor must be "otherwise qualified and eligible to receive an award," 48 C.F.R. 9.104-1(g), and suspension and debarment mean, respectively, "disqualification" and "exclusion" from government contracting, 10 U.S.C. 2393(c). Petitioners therefore did not meet the threshold requirements of qualification for consideration of the 18 bids they submitted following their suspension and proposed

[7] Petitioners' reliance (Pet. 46-48) on *Horne Bros.* v. *Laird*, 342 F. Supp. 703 (D.D.C.), rev'd on other grounds, 463 F.2d 1268 (D.C. Cir. 1972), is misplaced because the regulation then in effect has been superseded by 48 C.F.R. 19.602-1, which eliminates SBA referral where there is a suspension or debarment. In addition, petitioners' discussion (Pet. 48-54) of the Small Business Act's legislative history is consistent with the court of appeals' discussion in *Siller Bros.*

debarment. Instead, petitioners' consistent history of inadequate contract performance fully justified their suspension and proposed debarment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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